

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
Huntington Division**

**CASIE JO MCGEE and SARAH  
ELIZABETH ADKINS; JUSTIN  
MURDOCK and WILLIAM GLAVARIS;  
and NANCY ELIZABETH MICHAEL and  
JANE LOUISE FENTON,  
individually and as next friends of A.S.M.,  
minor child,**

**Plaintiffs,**

**v.**

**Civil Action No. 3:13-CV-24068  
Honorable Robert Chambers**

**KAREN S. COLE, in her official capacity as  
CABELL COUNTY CLERK; and VERA J.  
MCCORMICK, in her official capacity as  
KANAWHA COUNTY CLERK,**

**Defendants.**

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT KAREN S. COLE AND  
DEFENDANT VERA J. MCCORMICK'S JOINT MOTION TO STRIKE PLAINTIFFS'  
"NOTICE OF SUPPLEMENTAL AUTHORITY IN OPPOSITION TO DEFENDANTS  
MCCORMICK AND COLE'S MOTIONS TO DISMISS" [DOCKET ENTRY # 44]**

COME NOW, Defendants Karen S. Cole, by counsel, and Defendant Vera J. McCormick, by counsel, and hereby submit the following memorandum of law in support of their contemporaneously filed Motion to Strike. In support thereof, these Defendants state as follows:

1. On November 26, 2013, Clerk McCormick filed a Motion to Dismiss this matter on the basis of, *inter alia*, abstention. (Dkt. 26 & 27). In response, on December 10, 2013, Plaintiffs' filed a "Memorandum of Law in Opposition to Defendant McCormick's Motion to Dismiss." (Dkt. 30). Subsequent thereto, on December 17, 2013, Clerk McCormick filed her Reply to Plaintiffs' Memorandum of Law in Opposition. (Dkt. 35). At this point, the briefing on this Motion had

concluded pursuant to the *Federal Rules of Civil Procedure* and the *Local Rules of Civil Procedure for the Southern District of West Virginia*.

2. On December 16, 2013, Clerk Cole filed a Motion to Dismiss in this matter asserting, *inter alia*, abstention as grounds for dismissal. (Dkt.30 & 31). Plaintiffs filed a “Memorandum of Law in Opposition to Defendant Cole’s Motion to Dismiss” on December 23, 2013. (Dkt. 37). On December 30, 2013, Clerk Cole timely filed a Reply to Plaintiffs’ “Memorandum of Law in Opposition to Defendant Cole’s Motion to Dismiss.” (Dkt. 38). At this point, the briefing on this Motion had concluded pursuant to the *Federal Rules of Civil Procedure* and the *Local Rules of Civil Procedure for the Southern District of West Virginia*.

3. Despite the aforementioned completion of the briefing on these Motions, Plaintiffs filed a “Notice of Supplemental Authority in Opposition to Defendants McCormick and Cole’s Motions to Dismiss.” (Dkt. 44) (hereinafter “Notice”). Clerks McCormick and Cole now move to strike this filing.

4. Pursuant to Rule 7.1(a)(7) of the *Local Rules of Civil Procedure for the Southern District of West Virginia*, “[s]urreply memoranda shall not be filed except by leave of court.” Here, despite the clever naming of this most recent filing by Plaintiffs, this document amounts to nothing more than a “surreply.” Specifically, Plaintiffs have placed argument regarding the decisions cited in this Notice regarding application of non-binding authority from jurisdictions not within the Fourth Circuit Court of Appeals. *See* Notice at pg. 2-3. Bolstering the fact that this filing is an improper “surreply”, a review of the *Federal Rules of Civil Procedure* and the *Local Rules of Civil Procedure for the Southern District of West Virginia* reveals no authority, and Plaintiffs do not cite to any authority, that permits a filing under this heading. In sum, this is a “surreply” plain and simple and, because Plaintiffs did not seek leave to file this “surreply”, it is improper and must be stricken from

the docket.

5. While, under the *Local Rules of Civil Procedure for the Southern District of West Virginia* Plaintiffs may have sought prior leave to filing this matter, there is no basis to allow such leave to file this surreply. While Plaintiffs believe that “supplementation” of “authority” is necessary to “assist” the Court in reaching a decision on Clerks McCormick and Cole’s Motion to Dismiss, this is a misconception on Plaintiffs part, as this “authority” is non-binding on this Court *and* supplementation at this juncture is inappropriate.

6. With respect to the actually decisions contained within the “supplementation”, the “authority” supplemented to this Court is non-binding authority, as the decisions are from District Courts and not any Court with binding precedential authority over this Court. In fact the persuasiveness of these decisions is also suspect, as these decisions are not even from District Courts within the Fourth Circuit Court of Appeals and certain case law relied upon by these District Courts *may* be in direct conflict to binding precedent in this Circuit.

7. In addition, supplementation at this juncture is inappropriate. With respect to the inappropriateness of “supplementing” “Exhibit A”, “Exhibit A” is a non-binding decision that was issued and filed prior to Plaintiffs filing their Response to Clerk Cole’s Motion to Dismiss. “Exhibit A” was filed on December 20, 2013, while Plaintiffs’ filed their Memorandum of Law in Opposition to Clerk Cole’s Motion to Dismiss on December 23, 2013. Now bringing to the Court’s attention this non-binding decision that was available to Plaintiffs before filing their responsive brief *after* all the briefing on these Motions were completed is simply disingenuous and inappropriate.

8. The supplementation of “Exhibit B” at this juncture is also inappropriate. “Exhibit B” to this Notice is a non-binding decision that was filed by a District Court on December 23, 2013. While Plaintiffs filed their Opposition to Clerk Cole’s Motion to Dismiss also on December 23,

2013, a disclosure at this point is improper because Plaintiffs waited until after Clerk Cole filed a Reply in order to file this supplementation. The decision was issued and available to be “supplemented” seven days before Clerk Cole filed a Reply. Instead, Plaintiffs conveniently “supplement” their previous filing after the Reply brief by Clerk Cole was filed; over two weeks after the issuing of the decision; and on the last business day before the parties appear before this Court. Thus, this late “supplementation” is improper.

9. Because supplementation is inappropriate, it is likely leave would not have been granted, even if Plaintiffs did not violate the *Local Rules of Civil Procedure for the Southern District of West Virginia* and requested leave prior to filing this document.

10. In sum, this Notice is a “surreply” and an improper, without first obtaining leave from this Court, at arguing non-binding decisions that were available to Plaintiffs prior to the completion to the briefing on these Motions. Pursuant to Rule 7.1(a)(7) of the *Local Rules of Civil Procedure for the Southern District of West Virginia*, this surreply must be stricken and not further considered by this Court.

**WHEREFORE**, based on the reasoning set forth above, these Defendants pray this Court will enter an Order striking Plaintiffs’ “Notice of Supplemental Authority in Opposition to Defendants McCormick and Cole’s Motions to Dismiss” from the record, as well as all other relief deemed just and proper

**Respectfully submitted,**

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**Defendants.**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of foregoing “MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT KAREN S. COLE AND DEFENDANT VERA J. MCCORMICK’S JOINT MOTION TO STRIKE PLAINTIFFS’ “NOTICE OF SUPPLEMENTAL AUTHORITY IN OPPOSITION TO DEFENDANTS MCCORMICK AND COLE’S MOTIONS TO DISMISS” [DOCKET ENTRY # 44]” was served upon the following parties through the Court’s Electronic Case Filing (ECF) system on this day, January 03, 2014:

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